



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 1757-02
14 November 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was retired by reason of physical disability or pursuant to the Temporary Early Retirement Authority (TERA).

2. The Board, consisting of Ms. Moidel and Messrs. Bishop and Geisler reviewed Petitioner's allegations of error and injustice on 19 September 2002 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 5 September 1995, the Physical Evaluation Board (PEB) determined that Petitioner was unfit for duty because of a right knee condition, bilateral knee pain, and obstructive sleep apnea. He was released from active duty on 16 November 1995 and transferred to the Temporary Disability Retired List. He completed 19 years, 4 months and 19 days of active duty service. He was reevaluated by the PEB on 7 November 2000. His rating was decreased to 20%, as the sleep apnea had improved, and was no longer considered unfitting or ratable. On 30 November 2000, the President, Physical Evaluation Board, directed that he be discharged by reason of physical disability, with entitlement to disability severance pay.

d. Petitioner contends, in effect, that he was under the impression that because of his previous period of limited duty, and the fact that he had obstructive sleep apnea, he could not remain on active duty in a limited duty status until he completed 20 years of active duty service. In addition, he was advised that while on the TDRL, his retired pay would exceed that which he would have received had he opted for retirement pursuant to TERA in lieu of placement on the TDRL, and that he would qualify for TERA in the event his disability rating was decreased below 30% and name removed from the TDRL. Given that advice, he felt he had nothing to lose by electing to be transferred to the TDRL in lieu of transfer to the Fleet Reserve. He subsequently learned that he could have requested retention on active duty in a limited duty status until he completed 20 years of service. In addition, he was ultimately denied military retirement, because the TERA program was no longer being funded by the Navy when his name was removed from the TDRL in 2000.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that had Petitioner been properly advised, he would have requested to remain on active duty in a limited duty status until he had completed 20 years of active duty service. Given the nature of his disabilities, and his excellent record of service, it is likely that his request would have been granted. The Board concluded that in view of the unique circumstances of this case, it would be in the interest of justice to correct Petitioner's record to show that he was transferred to the Fleet Reserve pursuant to the TERA at the conclusion of his tenure on the TDRL.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged by reason of physical disability.

b. That Petitioner's naval record be further corrected to show that on 1 December 2000, he was transferred to the Fleet Reserve pursuant to the Temporary Early Retirement Authority.

c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.


W. DEAN PFEIFFER
Executive Director